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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

MIDDLEWEST MOTOR FREIGHT BUREAU, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA and NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS IN OPPOSITION

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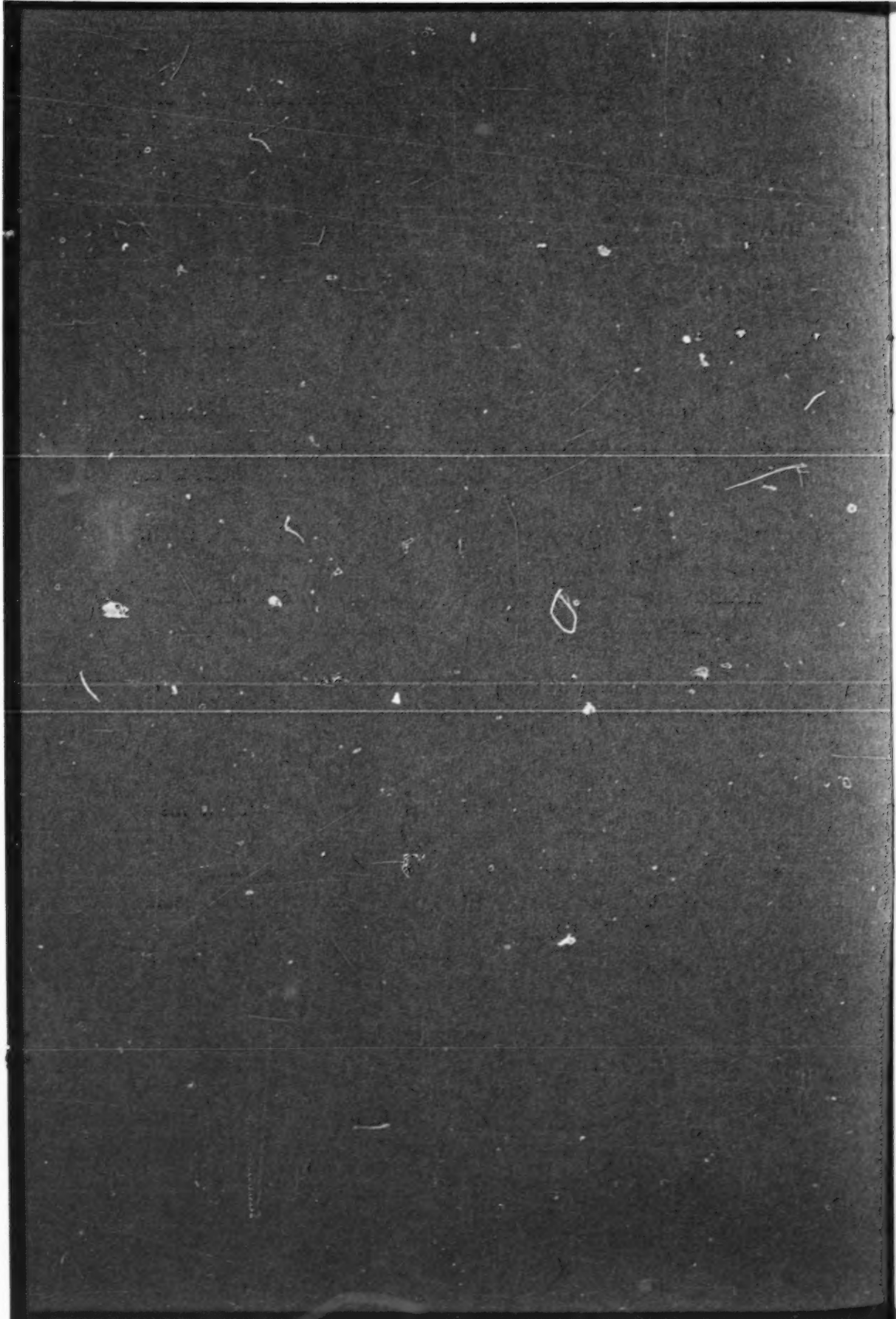

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This supplemental memorandum is submitted pursuant to Rule 24(5) to call to the Court's attention documentary matter that is dispositive of contentions raised by petitioners on reply brief.

Petitioners undertake to distinguish the *Accelerated Transport* case* by asserting the District Court did not there, as here, determine the measure of restitutional damages independently of the Commission. They say (Reply, p. 10):

* *Accelerated Transport-Pony Express, Inc.* v. *United States*. 227 F. Supp. 815 (D.C. Vt. 1964), aff'd per curiam, 379 U.S. 4 (1964).

> "On the contrary, the measure of damages in restitution was determined by the Commission in the very order the District Court held valid and therefore improvidently restrained."

Documentary material submitted by the carriers to the Commission in the *Accelerated* case demonstrates that petitioners have erroneously characterized to this Court the nature and effect of the Commission's order as including a determination of the measure of damages in restitution.

1. *The Commission's order in Accelerated left the maximum reasonable rates undetermined.* In *Accelerated* the Commission ordered the schedules cancelled to the extent found unlawful, without prejudice to their amendment so as to make applicable "lower rates to more distant points as maxima at intermediate border points" (319 I.C.C. 168 at 177). The lower rates to more distant points were not specified in the Commission's report or order. There were at least four variables, two with respect to time and two or more with respect to the particular more distant points that were to be held as maxima. That is, with respect to a haul to Pittsburgh, Pa., whether the maximum was to be the lower rate to Steubenville, Ohio, 37 miles from Pittsburgh, or Zanesville, 127 miles from Pittsburgh. The Steubenville rate, representing a shorter haul, was of course very much lower than the rate to Zanesville. It made a great difference whether Steubenville or Zanesville —or rates for any of the points between—become the standard of maximum reasonableness for the shorter haul to Pittsburgh. It was thus impossible to determine from the Commission's order just what the standard of maxi-

mum reasonableness was. The carriers themselves so declared in a petition filed with the Commission on May 25, 1964, seeking a determination that their tariffs were in compliance with the Commission's order. They said:

> "The order here sought is necessary because of the uncertainty as to the meaning of that decision and hence the uncertainty as to whether the tariffs being filed are in compliance with that order."

In a later section of their petition, captioned "The Uncertainty of the Decision and Order" they described as areas of variability with respect to the standard of maximum reasonable rates, the dates at which the rate disparities were to be measured and "the choice of points beyond." At page 6 they stated:

> "The question is to which more distant points? Respondents' tariffs to be effective June 26 do not fix as maximum rates at intermediate points the presently effective rates at the first more distant points beyond. For example, they do not fix as the maximum rates at Lynchburg, Virginia, the present rates to Gretna, Virginia, the next point beyond Lynchburg. Rather, they fix as maximum at Lynchburg the present rates to Reidsville, North Carolina."

The petition of the carriers is reproduced and folded into this brief as Exhibit A. The Commission's response to the carriers' petition for an order approving the carriers' choice of time and place in their tariffs, purportedly in compliance, was denial. The Commission at the same time denied a motion filed by the shippers to reject the tariffs.

There was thus left completely open and undetermined in June 1964 the question of what was the standard of maximum reasonable rates under the Commission's order of cancellation that was issued on March 20, 1963.

2. *The Court in Accelerated fixed the measure of restitutional recovery.* In 1965, proceedings were instituted under Rule 65(c) of the Federal Rules of Civil Procedure to assess damages flowing from restraint of the Commission's order. By order of December 22, 1965, the matter was referred to a Master to determine the amount of damages sustained. The carriers were required to file with the Master an account of monies collected in excess of charges that would have been applicable had the Commission's order not been restrained. Following the submission of an accounting, objected to by the shippers as inadequate, the carriers and shippers sought to arrive at agreement as to which of some five varying possibilities should be used as the basis for the restitutional award. After analysis by the parties of the respective formularies, a stipulation was entered into which referred to "the difficulty of determining which of many interterritorial rates shall be used as maxima and what intraterritorial movements shall be deemed subject to the maxima." The stipulation was signed by all the parties including representatives of the Interstate Commerce Commission, the United States, and the Department of Justice. It was approved by the District Judge on May 31, 1967 and became the basis for restitutional recovery. The case is discussed fully in the opinion below (Pet. A 28a-29a).

3. *The instant case involved long and short haul disparities.* At page 10 of their Reply, petitioners state:

> ". . . the Commission there found [in *Accelerated*] that rates for short hauls higher than rates for long hauls were unlawful—a finding not present in the case at bar . . ."

The Commission did in the case at bar include references to rate disparities of this sort. It found the existence of anomalous situations in rates higher for short than long hauls via the same carrier over the same route and directed their removal if the presumption of unreasonableness remained unrebutted, citing *Accelerated* (Pet. A 95a).

CONCLUSION

Respondents consider that it would usurp the office of supplemental brief to answer *seriatum* contentions of the petitioners in their reply brief. Respondents suggest that the answers are to be found in the opinion of the Court of Appeals. Particularly apt is the Court's discussion of the measure of restitutional recovery in this case (Pet. A 19a-20a). Fully considered are *Arkadelphia* and *Ex Parte Lincoln Gas* (Pet. A 21a-26a). The opinion supplies a complete answer to the contention that a Commission adjudication of rate reasonableness is a precondition to restitution (Pet. A 35a-44a). Petitioners' self-defeating argument that the merits of the complaint, which they moved for dismissal, remain to be adjudicated ("Literally, nothing was left for review"—brief to court below pp. 17-18) is conclusively answered (Pet. A 56a-58a). Effectively revealed in the opinion below are the contributions made

by the equitable remedy of restitution to stability of the ratemaking process; and the destruction that would be visited on the regulatory scheme by introduction of the conditions precedent contended for by the petitioners (Pet. A 40a-42a).

Respondents respectfully suggest that neither in petition nor reply have petitioners stated reasons that warrant review by this Court of the decision below. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 12, 1971

BEFORE THE

1964 MAY 25 PM 1:04

INTERSTATE COMMERCE COMMISSION

DOCKET NO. 33652

GENERAL INCREASE-MIDDLE ATLANTIC
AND NEW ENGLAND TERRITORIES

PETITION
FOR ORDER APPROVING TARIFFS

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Dated: May 22, 1964

BEFORE THE

INTERSTATE COMMERCE COMMISSION

DOCKET NO. 33652

GENERAL INCREASE-MIDDLE ATLANTIC
AND NEW ENGLAND TERRITORIES

PETITION
FOR ORDER APPROVING TARIFFS

Come now Respondents in this case whose tariffs are published by Middle Atlantic Conference and, pursuant to Section 1.102 of the General Rules of Practice, file this Petition for an Order Approving Tariffs filed simultaneously herewith. In support of this Petition Respondents say:

NEED FOR THE RELIEF SOUGHT

Division 2, by decision and order entered on March 20, 1963, found unlawful such of Respondents' increased rates under investigation "to intermediate points [within Middle Atlantic Territory as] are higher than the rates to more distant points [beyond that Territory] over the same routes." It therefore ordered such rates cancelled on or before May 10, 1963 "without prejudice to their amendment so as to provide for the application of lower rates to more distant points as maxima at intermediate border points." 319 I.C.C. 168 at 177. By subsequent orders the date for compliance with the order was extended to June 26, 1964. Accordingly, Middle Atlantic Conference, as publishing agent for

Respondents, is filing simultaneously herewith tariffs to be effective on June 26, 1964.[1/] Special permission to depart from the requirements of the Tariff Circular permitting the filing of those tariffs was granted (No. 30817-M). That application for special permission is appended hereto. It explains in detail and illustrates with a sample tariff how compliance is being effected.

By this Petition Respondents seek an order specifically finding that said tariffs are in compliance with the decision and order of March 20, 1963. The order here sought is necessary because of the uncertainty as to the meaning of that decision and hence the uncertainty as to whether the tariffs being filed are in compliance with that order. Unless the order here sought is issued Respondents will be in jeopardy of criminal and civil prosecution under Sections 222(a) and 222(b) of the Interstate Commerce Act for violation of the order of March 20, 1963. Moreover, they may be liable to shippers and receivers for damages should it be subsequently determined that the rates in the tariffs being filed are not in compliance with the decision and order of March 20, 1963 and that they produce higher charges than would be produced by rates in compliance with that decision and order.

1/ The decision and order of March 20, 1963 were affirmed by the United States District Court for the District of Vermont in Accelerated Transport-Pony Express, Inc., et al. v. United States and Interstate Commerce Commission, 227 F. Supp. 815 (1964). An appeal to the Supreme Court from that affirmance has been noted and will be pressed. Therefore the tariffs Respondents are filing carry an expiration date of November 1, 1964. If by that time the Supreme Court has affirmed the judgment of the District Court the expiration date will be removed. If the case is still pending and there has been no stay of the order of the Commission it will be extended. If the Court has stayed the order or reversed the judgment the tariffs will be cancelled or expire.

Respondents may be liable to shippers and receivers for damages notwithstanding that under T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959), a suit for reparations grounded on the unreasonableness of rates will not lie. The Court was there dealing with duly and properly filed rates. The question before it was whether an allegation that rates concededly legal under Section 217 of the Act are unlawful under Section 216 raises a justiciable question. The Court answered no, relying in large part on Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951).

The Court in T.I.M.E. did not reach the question whether there is a justiciable legal right to recover reparations grounded on rates not duly and properly filed. Compare Montana-Dakota, supra, in which Justice Frankfurter and three of his brethren dissented because, in their view, the plaintiff stated a cause of action cognizable in a federal court when it alleged that the rates were unlawfully established and unlawfully filed with the Federal Power Commission. The opinion of the majority of the Court did not categorically reject this view. Rather, it seems to say that the plaintiff had not clearly alleged a violation of the Federal Power Act or any rule or order of the Federal Power Commission. In any event, that the question is open under the Interstate Commerce Act and T.I.M.E. is clear from Lynchburg Traffic Bureau v. Smith's Transfer Corp., 285 F. 2d 743 (4th Cir. 1961).

The Lynchburg Case was a suit for reparations grounded on allegedly unreasonable rates filed with this Commission. The District Court dismissed the complaint on the authority of T.I.M.E. On appeal the plaintiff contended that its case was not controlled by T.I.M.E. because the defendant's rates had been established and filed in disobedience of an order of the Commission. The Court of Appeals said,

285 F. 2d at 744:

> "If, indeed, we could perceive in the earlier proceedings to which our attention has been called, (though they were not made a part of the record,) a plain order or orders of the Commission which had the effect of approving certain rates applicable to the shipments here in question, and the defendant's charges were in excess of such rates, the plaintiff might well have a case not falling within the T.I.M.E. ruling. We cannot so adjudicate on this record."

Accordingly, the Court of Appeals remanded the case to the District Court "to give the plaintiff an opportunity . . . to file an amended complaint alleging facts, if they exist, which might entitle it to relief." 285 F. 2d at 745.

THE UNCERTAINTY OF THE DECISION AND ORDER

Rates In Effect Before Increases

It cannot be gainsaid that there is uncertainty about the meaning of the decision and order of March 20, 1963. Does it require Respondents to adjust their rates in effect on January 15, 1961, the day before the increased rates in issue became effective, so as to eliminate border disparities or does it merely require them to cancel the increased rates in issue in the proceeding to the extent that they created disparities or worsened existing disparities? Respondents are of the view that the latter is all that the decision and order could or did so.

This case was, in the words of the decision, "an investigation instituted by order dated January 13, 1961, into the lawfulness of general increases . . . published to become effective on January 16, 1961, and later . . . ." 319 I.C.C. at 168. Section 216(g) of the Act, which confers authority to investigate proposed changed rates provides that "after hearing . . . the Commission may make such order . . . as would be proper

in a proceeding instituted after [the rates] had become effective," i.e., a proceeding under Section 216(e). Section 216(e) provides that, if after hearing in investigations of existing rates the Commission finds the rates unlawful, "it shall determine and prescribe the lawful" rates. Construing the comparable sections of Part I of the Act, the Supreme Court has held that in investigations of proposed changed rates the Commission has authority to modify not only the changed rates, but the pre-existing rates as well. Ayrshire Collieries Corp. v. United States, 335 U.S. 278 (1949).

Assuming arguendo that the holding in Ayrshire Collieries governs the reach of the Commission's authority under Section 216(g), that holding has no application here for two reasons. First, the Commission's decision and order of March 20, 1963 did not purport to modify Respondents' pre-existing rates. All the Commission's order required was the cancellation of the increased rates to the extent found unlawful. Second, in contrast to Ayrshire Collieries, there was no evidence of record to support either a finding that the rates in effect on January 15, 1961 were unlawful or a determination and prescription of rates in lieu thereof. And the Commission made neither such a finding nor such a determination and prescription.

Therefore, Respondents' tariffs filed in compliance with the order of March 20, 1963 provide that rates to intermediate points in Middle Atlantic Territory shall be either the rates to the points beyond or the rates in effect immediately prior to the rates at issue in this case, whichever are higher. Respondents ask the Commission to issue an order specifically finding that this is compliance with that order.

The Choice Of Points Beyond

The Commission's decision of March 20, 1963 found unlawful rates to intermediate points "higher than rates to more distant points." 319 I.C.C. at 177. The question is to which more distant points? Respondents' tariffs to be effective June 26 do not fix as maximum rates at intermediate points the presently effective rates at the first more distant points beyond. For example, they do not fix as the maximum rates at Lynchburg, Virginia the present rates to Gretna, Virginia, the next point beyond Lynchburg. Rather, they fix as maxima at Lynchburg the present rates to Reidsville, North Carolina.

Respondents support this method of compliance with the decision and order of March 20, 1963 on four grounds. First, neither that decision nor that order in terms require that the rates to an intermediate point be no higher than the rate to the first more distant point beyond.

Second, both Eastern Central Motor Carriers Association and Southern Motor Carriers Rate Conference have approved for publication a re-grouping of points immediately south and west of the borders of Middle Atlantic Territory. If the proposed re-groupings become effective the rates to the points beyond that Respondents have chosen as the points to which intermediate points are to be refined will be in fact the rates to the first points beyond.

Third, the points beyond selected as the points of reference for fixing maximum rates at intermediate points are the points beyond to or from which substantial volumes of traffic move.

Fourth, to fix as maxima at intermediate points the present rates to the first points beyond would result in a much greater loss of revenues - a loss that would further jeopardize Respondents' financial abaility to perform their duty to render adequate and efficient service. That their financial position is already precarious is shown by the Justification filed May 4, 1964 in support of the general increase in rates, effective May 15 and June 22 on class rates and July 1 on commodity rates. Despite Protests, the Commission refused to suspend the increases on class rates.

Respondents ask the Commission to issue an order specifically finding that this is compliance with its order of March 20, 1963.

The Grouping Of Intermediate Points

Just as it is necessary to determine what points beyond will be used as points of reference for fixing maximum rates at intermediate points, so it is necessary to determine what particular intermediate points are to be referred to each point beyond. For example, Petersburg, Virginia, on the southern border of Middle Atlantic Territory, is about the same distance west of Windsor, North Carolina as it is east of Rocky Mount, North Carolina, both of which are points of reference for fixing maximum rates at intermediate points. Is Petersburg to be referred to Windsor or Rocky Mount? Respondents have solved this problem in the following way. Windsor is between 76° and 77° West Longitude. Rocky Mount is between 77° and 78° West Longitude. Therefore, all intermediate points between 76° and 77° are referred to Windsor. All between 77° and 78° are referred to Rocky Mount. Petersburg being between 77° and 78° West Longitude, it is referred to Rocky Mount. The problem is solved in the same way at the western border, except that parallels of latitude

are used. For example, Zanesville and Akron, Ohio are both points of reference. All intermediate points between 40° and 40° 30' North Latitude are referred to Zanesville. All intermediate points between 40° 30' and 41° 30' are referred to Akron.

Complete Compliance

The result of Respondents' choice of points beyond will effect complete compliance with the decision and order of March 20, 1963 as to the western border of Middle Atlantic Territory if the re-grouping of points in Eastern Central Territory takes effect on June 26, 1964 as published. It will not effect complete compliance as to the southern border until the re-grouping of points in Southern Territory takes effect. That re-grouping is expected to be published to take effect on or about August 3, 1964.

The method of grouping intermediate points to particular points beyond will be complete compliance except in cases in which a particular carrier has a route of movement from an intermediate point to a point beyond other than the point beyond to which the intermediate point is referred. But it is obviously impossible to take account of every one of Respondents' multitudinous routes. To attempt to do so would destroy any semblance of a rate structure in Middle Atlantic Territory. Furthermore, as the sample tariff appended hereto as part of the application for special permission to depart from the requirements of the Tariff Circular shows, the reasonable method by which Respondents have chosen to comply with the order of March 20, 1963, results in a highly complex set of tariffs. Tariffs that would foreclose every possibility of a rate to an intermediate point higher than a rate to a point beyond over the same route of movement, if they could be published at all, would be so complex as to be unuseable.

ECONOMIC HARDSHIP

The rule of rate making in Section 216(i) of the Act requires that the Commission "give due consideration . . . to the need, in the public interest, of adequate and efficient transportation service . . . and to the need of revenues sufficient to enable (Respondents), under honest, economical and efficient management, to provide such service." We submit that to read the decision and order of March 20, 1963 as requiring the adjustment downward of rates in effect prior to the increases made on January 16, 1961, or to require rates to intermediate points to be held at the levels of presently effective rates at the first points beyond, or to require the elimination of every possibility of a rate to an intermediate point higher than a point beyond over the same route of movement would impose such economic hardship on Respondents as to violate Section 216(i).

There is hardship enough in any attempt to alleviate border disparities. One measure of it is seen in the finding of District Judge Gibson in support of his order of December 17, 1963 restraining the enforcement of the Commission's order of March 20, 1963. He estimated Respondents' losses from compliance with that order to be as high as $791,700 per day. That finding was based on affidavits in the record before the District Court and was not challenged by anyone. A more precise measure of the hardship will be shown in the petition in support of this petition to be filed by the group of Respondents whose principal operations are to and from the western border of Middle Atlantic Territory. As for the precise measure of the hardship to those carriers whose principal operations are to and from the southern border of Middle Atlantic Territory, it will be shown by a supplement to this petition to be filed as soon as an analysis of the Continuing Traffic Study on which it will be based is completed.

CONCLUSION

For all of the foregoing reasons Respondents pray the Commission to issue an order specifically finding that the tariffs filed simultaneously herewith are in compliance with its decision and order of March 20, 1963 in this case.

Respectfully submitted,

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Dated: May 22, 1964

CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of May, 1964, served a copy of the foregoing document upon all parties of record by mailing copies thereof by first class mail, properly addressed with postage prepaid.

Bryce Rea, Jr.